United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2010

To be argued by
Joan P. Scannell

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CARLSON TANNER, JR., :

Petitioner-Appellant, :

-against- :

PEOPLE OF THE STATE OF NEW YORK, :

Respondent-Appellee. :

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P/S

BRIEF FOR RESPONDENT-APPELLEE

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TABLE OF CASES

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BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court for the Eastern District of New York (Costantino, J.) dated November 3, 1975, denying petitioner-appellant's application for a federal writ of habeas corpus.

Questions Presented

1. Whether there is any basis to question the State Court's finding, following the Huntley Hearing, that the second confession was voluntary.

2. Whether according to federal constitutional standards petitioner's first confession was involuntary. If so whether a prior involuntary confession thereby taints all subsequent confessions.

3. Whether petitioner was given full notice of and a full hearing on the statements which were going to be used against him in evidence.

4. Whether assuming arguendo that it was error to admit in evidence petitioner's confession, it was harmless beyond a reasonable doubt.

Preliminary Statement

Petitioner-appellant ("petitioner") was convicted on April 10, 1969 after a jury trial in the Supreme Court, Queens County of the crimes of Manslaughter in the Second Degree, Robbery in the First Degree and Possession of a Weapon. Petitioner was sentenced to a maximum of twenty-five years on the robbery charge and a maximum of fifteen years on the manslaughter charge; the sentences to be served consecutively. The conviction was affirmed by the Appellate

Division, First Department, 36 App. Div. 2d 690 and the New York Court of Appeals, 30 N Y 2d 103. Petitioner applied for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The writ and the subsequent request for a certificate of probable cause were denied. On January 27, 1976, this Court granted a certificate of probable cause.

Statment of Facts

A. The Crime

On March 15, 1968, petitioner shot and killed Mr. Blum, a taxicab driver and robbed him of twenty-four dollars. Prior to the murder, petitioner and his accomplice Kenneth Fulmore were drinking at the Magnet Bar (364-365). Petitioner and Fulmore then left the bar and attempted to hail a cab. The first cab passed them by but the second one stopped (366, 370). They entered the cab and told the driver to take them to Vernon Boulevard (367, 370). During the ride, appellant told Fulmore that they need some money and suggested that they "take off the cab (371-372). At this point, petitioner pulled out his silver plated revolver, placed it between his

legs and ordered the cab driver to stop and turn off his lights (371-372). Petitioner then got out of the cab, opened the right front door and held his gun on the deceased (374, 376). Mr. Fulmore also got out of the car and observed the deceased give petitioner his money clip, money changer and some money (378, 381). The deceased then pleaded with petitioner, stating, "Don't shoot me. The first guy passed you by, but I picked you up" (377). Despite this begging, petitioner told the taxi driver to lay across the seat, then shot him in the head (381-382). When asked by his accomplice Fulmore, why he shot the deceased, petitioner replied, "Well, this shows you I can take a life" (386).

B. The Arrest

Petitioner was arrested by Detective Katz, in his room at the Hotel Holland in Manhattan (169-170). The detective testified that when he opened the door of petitioner's room, he noticed a silver nickel plated revolver on a desk. He then asked petitioner whether he had a permit for the gun. Petitioner replied that he did not (27). He then placed petitioner under arrest

(172-173, 220-221). During the search of petitioner's hotel room, a .38 caliber spent shell was found in the right hand pocket of the trousers petitioner had worn the night before (28-29, 179-181). In petitioner's dresser drawer, they found a .38 caliber revolver and nine live bullets (176-179). Also found in the room was a taxi trip ticket, a money clip belonging to the victim and a quantity of coins and bills amounting to approximately $12.00 (182-183, 190).

C. The Huntley Hearing

At the Huntley hearing, Detective Katz testified that after informing petitioner he was under arrest he informed petitioner that he had a right to remain silent; that any statements he made could be used against him in a court of law; that he had a right to an attorney at all stages of the proceedings and that if he could not afford an attorney, the Court would appoint him an attorney (13-16). Petitioner stated he did not need an attorney (16). Thereafter, petitioner told the detective that the night before he had been out drinking with a friend in Long Island

City. He stated that he left his room at about 10:00 P.M. and returned about 2:30 A.M. (28). Petitioner further stated that he had bought the gun from someone downtown about one year ago and denied being in a taxi or being involved in any shooting the previous night (28-29).

Thereafter, the detective and petitioner drove to the police precinct. The detective testified that the conversation during the drive and in the squad room of the precinct was in substance the following:

> "After we left the bar, we went out, me and the defendant Fulmore went out in the street to either holdup a pedestrian or stick-up a bar and we couldn't find any place to hit. We went back to the bar, we had another drink, and we decided to go visit - Fulmore decided that he was going to his wife's house and Tanner said that he was going to visit his girlfriend's house in the projects. They went up to Queens Plaza, Jackson Avenue and defendant Tanner stated that Fulmore hailed a cab and the cab passed, kept going. They hailed another cab and the driver stopped. The defendant Tanner further stated that he got in the cab and sat behind the driver while the defendant Fulmore sat next to him. They told him to go to 41-16 Vernon Boulevard. En route to 41-16 Vernon Boulevard defendant Tanner stated that Fulmore said that he was going to holdup the cab driver. As the driver made a right-hand turn onto

> Vernon Boulevard, according to Tanner, Fulmore produced a gun and stuck it through the glass partition separating the driver and the passengers. Tanner stated that Fulmore placed the gun through and announced it was a holdup and said stop the cab and back it into a spot under the 59th Street Bridge on Vernon Boulevard. Tanner further stated that at this time Fulmore reached through the partition, opening the right-hand side of the cab, opening the latch, got out of the taxicab, and opened the door. At this time defendant Tanner said he left the cab, exiting from the rear left side of the cab. At this time Tanner said that Fulmore received the money for the cab driver and told him to lay down on the seat, and as Tanner was leaving the cab and coming around the cab he heard a shot go off and at this time defendant Tanner said that both he and Fulmore started to run towards Queens Plaza and stated that when they reached Queens Plaza they took a train back to Manhattan, back to defendant Tanner's room where defendant Fulmore went to sleep and defendant Tanner went out to get some food and returned to their home, or their house in the Hotel Holland, and went to sleep" (29-31).

The Assistant District Attorney Anthony Lombardino testified that at the precinct prior to asking petitioner any questions he advised him of his rights in the following:

> "I am going to apprise you and advise you of these rights and if I should advise you of a particular right which you have any

doubt about or you do not understand or you want clarification, please let me know this, and he said, 'I understand what you are saying.' I said to him that, 'I advise you and tell you that you have a right to remain silent. Do you understand?' And he answered to me, first shaking his head and I instructed him he must answer so that we can hear his answer, that it could not be recorded by the stenographer, and he said, 'I understand I have a right to remain silent.'
I said to him, 'I advise you and tell you that anything you may say by virtue of this questioning and the answers you give me that are being recorded now, can be used in a court of law by a prosecution, by the People of the State of New York against you for the crime of murder', and he said, 'I understand'.

I said, 'I apprise you and I tell you that you have a right to an attorney at all stages of the proceedings,' and I said, 'as you and I sit here now, this is deemed part of the proceedings.' And he said, 'I understand.'

I further said to him, 'I advise you and tell you that if you cannot afford to retain an attorney, you have the right to have an attorney assigned to you free of charge. Do you understand?' He said, 'Yes, I do.'

I said, 'Now, after me apprising you of your constitutional rights, will you make a voluntary statement of your own free will as to what transpired?' And he said, 'I will'" (66-67).

Petitioner stated that he did not need an attorney (68). The Assistant District Attorney then proceeded to question petitioner. Petitioner admitted being in a taxicab with Fulmore on the morning of the murder and that they had planned to go to Fulmore's wife's home. Petitioner denied having any weapons and stated that Fulmore had a nickel plated .38 caliber revolver which belonged to petitioner which he had purchased uptown (70). Petitioner further stated that during the course of the taxi ride he had a conversation with Fulmore and they stated they needed money and they were "going to take the taxicab driver" (71). Petitioner stated that Fulmore drew a revolver, ordered the taxicab driver to stop, robbed him of twenty-four dollars and shot him. They seized the deceased's money clip and the money changer (71). Petitioner claimed that Fulmore brought the proceeds of the robbery and the money clip back to the room (71). Petitioner then identified the .38 caliber revolver which belonged to petitioner as the murder weapon and also identified a picture of Mr. Blum as the deceased (71-72). The Assistant District Attorney

testified that prior to taking petitioner's statement, he informed petitioner that he was aware of his earlier statements to the police (74).

Petitioner testified at the hearing that at the time of his arrest, the police officer threatened to kill him, physically abused him and threatened to smash his brains out with a coke bottle (86) and push him out the window (83-84). Petitioner claimed that he was never advised of his rights by the police officers (89-90) and was advised of his rights to counsel by the Assistant District Attorney. Petitioner stated that he did not ask for an attorney because he was scared because the detective promised to kill him (92). Upon cross-examination, petitioner admitted that he was advised of his constitutional rights and he understood them (96). He never stated that he did not wish to make a statement or that he had been physically abused (97). He further admitted that he did not tell his lawyer or the judge that he was physically abused (98-100).

At the hearing the Assistant District Attorney stated that they would not offer in evidence statements petitioner made to the police at the time of arrest, en

route to the precinct and in the squad room. The Assistant District Attorney did state, however, "the People will question Detective Katz and possibly Detective Sullivan if he was present; in fact when I took the statement which reduced itself to the Q and A, questions and answers, and through Detective Katz, I will attempt to develop what the defendant said to me." (118).

D. The Trial

At the trial, Assistant District Attorney Lombardino testified that he advised petitioner of his constitutional rights and petitioner stated that he understood his rights and was willing to make a statement (264-266). Mr. Lombardino then conducted a "dry-run" conversation with the petitioner in order to familiarize himself with the case (270-271). Lombardino testified that petitioner told him that on the previous evening he and Fulmore were in the Magnet Bar. They left the bar and decided to take a cab to Fulmore's wife's apartment on Vernon Boulevard (267-268). After they got into the cab, Fulmore said, "We're going to take the cab driver" to which petitioner replied, "All right, he may not have much money, but we always need money. Let's take him" (268). Petitioner pulled out a silver plated .38 caliber revolver

which petitioner admitted belonged to him (268-269). Mr. Lombardino testified that petitioner told him that they had taken twenty-four dollars and identified a picture of the deceased (270). Petitioner also testified that the taxicab driver pleaded for his life, but Fulmore shot the driver (270). Mr. Lombardino testified that following the dry-run, he told the defendant that he wanted to reduce the conversation to a formal written statement (267, 271). Mr. Lombardino testified that the dry-run factually corresponded with the recorded statement but petitioner did hedge on some of his answers during the written statement yet he did not contradict himself (276-277).

POINT I

THERE IS NO BASIS TO QUESTION THE FINDING BY THE STATE COURT FOLLOWING THE HUNTLEY HEARING THAT THE SECOND CONFESSION WAS VOLUNTARY.

The finding by the State Court hearing that petitioner's second confession was voluntary is presumed correct. (28 U.S.C. 2254[d]). Petitioner has wholly failed to rebut this presumption.

Prior to trial, a hearing was conducted to determine the voluntariness and admissibility of petitioner's confessions. This hearing was a full and fair one, at which petitioner, as well as the police and the Assistant District Attorney who questioned petitioner, testified and were subjected to extensive cross-examination. The findings of this State Court hearing are presumed correct, unless petitioner can prove that he is within one of the eight statutory exceptions. LaVallee v. Delle Rose, 401 U.S. 690 (1973); United States ex rel. Sabella v. Follette, 432 F. 2d 572, 574 (2d Cir. 1970); United States ex rel. Johnson v. Department of Correctional Services of the State of New York, 461 F. 2d 95, 96 (2d Cir. 1972).

Petitioner has wholly failed to set forth any allegations which would categorize the instant case within the statutory exceptions. Moreover, petitioner failed to demonstrate that he did not receive a full and fair hearing or that the decision of the trial court was incorrect.

At the conclusion of the hearing, the trial court found that petitioner voluntarily waived his right to an attorney (124-126) and was not subjected to any coercion; thus petitioner's second confession was admissible. These findings directly contradict petitioner's contentions.

Petitioner cites the case of United States ex rel. Stephen J.B. v. Shelly, 305 F. Supp. 55 (1969); affd. as modified, 430 F. 2d 215 (2d Cir. 1970), as the chief authority for the proposition that his second confession was inadmissible because it was preceded by an allegedly involuntary confession. In the above case, this Court recognized that the findings of a State Court hearing are presumed correct and qualified its decision at 218, fn. 4 on the basis that neither of the parties raised the issue of the presumption of correctness. The Court therefore assumed ". . .as the parties have done, that the question of voluntary waiver was open to the fullest to scrutiny by the judge." Likewise, Judge Hays in his concurring opinion stated at 219 that he concurred on the grounds set forth in footnote 4 in that "since § 2254(d) was not raised by the parties -- this is not an appropriate case in which to resort to that statute in order to reverse the decision of the District Court."

Thus it is clear that United States ex rel. Stephen J.B. v. Shelly, supra is distinguishable from the case at bar in that here, petitioner is bound by the presumption of correctness and has failed to offer any proof to rebut that presumption.

POINT II

PETITIONER'S SUBSEQUENT CONFESSION TO THE ASSISTANT DISTRICT ATTORNEY WAS VOLUNTARY AND FREE OF ANY TAINT FROM THE PRIOR ALLEGEDLY INADMISSIBLE CONNFESSION. IN ANY EVENT, PETITIONER'S FIRST CONFESSION WOULD BE DEEMED VOLUNTARY UNDER FEDERAL CONSTITUTIONAL STANDARDS.

Petitioner contends that the failure to inform him of the alleged inadmissibility of his prior confession precluded him from subsequently waiving his rights and making a voluntary confession. This claim is spurious.

The law is clear that even if a prior confession is involuntary, it does not thereby taint all subsequent confessions pursuant to a "cat out of the bag" theory. As the Supreme Court stated in United States v. Bayer, 331 U.S. 532, p. 540 (1947), ". . .this Court has never gone so far as to hold that making a confession under circumstances which preclude its use

perpetually disables the confessor from making a usuable one after those conditions have been removed." Accord, United States v. Knight, 395 F. 2d 971 (2d Cir. 1968); Knott v. Howard, 378 F. Supp. 1325 (D. Rhode 1974), affd. 511 F. 2d 1060 (1st Cir. 1975).

Rather than presume the illegality of a subsequent confession because of a prior involuntary one, the test is whether the later confession is voluntary. Myers v. Frye, 401 F. 2d 18 (7th Cir. 1968). The voluntariness of the second confession is not a question of law but one of fact to be determined on the totality of the circumstances. Clewis v. Texas, 386 U.S. 707, 708 (1967).

In cases with facts considerably more onerous than the case at bar, the courts have found subsequent confession voluntary. In United States v. Knight, supra, which is analogous to the case at bar, the defendant made certain admissions to local authorities, during an interrogation, without being given Miranda warnings. Later, the defendant repeated the admissions to an F.B.I. agent after receiving proper warnings. The defendant claimed that

his second admission was tainted by the former. The Court citing United States v. Bayer, supra, stated at 975, "that an admission once made should not in itself always be fatal." The Court further stated that a second confession's admissibility ". . .depends upon the 'causal relationship' between the earlier unconstitutional interrogation by the local police and the later incriminating statement. . .The ultimate issue is whether the federal authorities were the beneficiaries of the pressure applied by the local in custody interrogation. Westover, 384 U.S. at 497, 86 S. Ct. at 1639."

In upholding the admissibility of the defendant's statement to the F.B.I., the Court found at 975 that "the 'compelling pressures' which concerned the Supreme Court in Miranda were absent." The Court distinguished Westover v. United States, 384 U.S. 436 (1966) in that in Westover prior to receiving any warnings, the defendant was interrogated continuously for fourteen hours. An additional distinguishing factor was that in Knight at , the suspect was questioned in his home. "Certainly the fact that a suspect is at home bears on whether pressure was applied."

The case at bar involves a situation analogous to the one in United States v. Knight, supra, rather than the coercive atmosphere in Westover v. United States, supra. Petitioner was questioned for a brief period, and after being given his Miranda warnings.

Furthermore, the two cases which petitioner cites in support of his claim of taint are clearly distinguishable from the case at bar. In United States ex rel. Stephen v. Shelley, supra, the defendant was a sixteen year old, who have never been in trouble with the police. His parents had forced him out of their car, miles away from home, because he had too much to drink. The defendant and his friend had been wandering around all night without sleep and had taken a stranger's car. When advised of his rights, the police had neglected to tell the defendant that anything he said could be used against him and he had a right to an appointed attorney if he could not afford one. The Court in determining that the defendant had not voluntarily relinquished a known right, took into account defendant's lack of maturity and consequent lack of education, his inexperience with police, and the fact that the sergeant testified

he observed the defendant crying and he looked as though he had not received enough sleep. In the instant case, petitioner was anything but a tired frightened youth who had never been in trouble with the police. Likewise, the case of United States v. Pierce, 397 F. 2d 128 (4th Cir. 1968), is clearly distinguishable in that there the defendant was warned only of his right to remain silent.

The record is devoid of any evidence indicating that either of petitioner's confessions were a result of coercion or that the Assistant District Attorney, in obtaining the second confession, benefited from any pressure applied by the police.

In the instant case, prior to being questioned by the police, petitioner was advised that he had a right to remain silent, that any statement he made could be used against him in a court of law. Petitioner was also told that he had a right to an attorney at all stages of the proceedings (14, 27). The detective then asked petitioner if he had an attorney, petitioner replied no. When upon inquiry, petitioner stated he could not afford a lawyer, the detective told him if he could not afford an attorney, the Court would appoint one for him. After all of these statements, petitioner told the detective that he understood what was being explained to him (16).

It stretches the imagination to analogize the instant case to those where the courts have found involuntary confessions. In fact the Trial Court did not rule that petitioner's first confession was involuntary or that he did not understand his rights. The prosecution agreed not to use the statements petitioner made to the police. The Trial Court suppressed these statements because it was not clear whether petitioner knew that his arrest was a stage in the proceedings (120-122).

However, the facts point to a finding that petitioner, when advised by the police, understood his rights perfectly. Petitioner had had previous experience with the law, he was a mature adult, and rather than confessing to the police, attempted to exculpate himself by placing the guilt on his accomplice.

Petitioner's "cat out of the bag" claim seems an afterthought on his part, to fit his situation into a legal theory. Petitioner's own statements are riddled with inconsistencies. At the Huntley hearing petitioner testified that he refused the assistance of counsel and confessed to the Assistant District Attorney because he was scared the police were going to kill him, if he didn't confess (92). Now petitioner claims that his

second confession was induced by the feeling that it would be futile to remain silent since his first confession had already let the cat out of the bag. Petitioner's claim is patently unbelievable.

In fact, it is doubtful that petitioner's first confession would be deemed inadequate under federal constitutional standards. In the case of United States v. Floyd, 496 F. 2d 982, 988 (2d Cir. 1974), the defendant was advised that he had a right to an attorney but the government agent admitted that he had not expressly informed the defendant that he had a right to an attorney present before any questioning began. In this case as in the case at bar, the defendant had answered in the affirmative when asked if he understood his rights. The Court held that the defendant had been adequately informed of his right to counsel. The Court stated at 998, "We have held that words of Miranda do not constitute a ritualistic formula which must be repeated without variation but that words which convey the substance of the warning along with the required information are sufficient." Accord, United States v. Pacelli, 470 F. 2d 67, 72 (2d Cir. 1972), cert. den. 410 U.S. 983 (1973);

United States v. Lamia, 429 F. 2d 373, 376 (2d Cir. 1970), cert. den. 400 U.S. 907 (1970); Evans v. Swenson, 455 F. 2d 291, 295 (8th Cir. 1972).

Also in Tasby v. United States, 451 F. 2d 394 (8th Cir. 1971), where the defendant was advised that an attorney would be appointed at the proper time, the Court stated at 398, "This statement even though a slight deviation from the Miranda prescription does not negate the overall effectiveness of the warning." Likewise, in the instant case, the deviation in the warning did not render the confession involuntary.

POINT III

PETITIONER WAS GIVEN FULL NOTICE PURSUANT TO § 813(f) OF THE FORMER CODE OF CRIMINAL PROCEDURE OF THE STATEMENTS WHICH WERE GOING TO USED IN EVIDENCE AGAINST HIM. FURTHER, PETITIONER WAS GIVEN A FULL HEARING ON THE ADMISSIBILITY OF THESE STATEMENTS.

Petitioner's contention that he was not given notice of the Assistant District Attorney's dry-run interrogation which was conducted immediately prior to

the formal question and answer is without merit. At the Huntley hearing, the Assistant District Attorney stated:

> "However, the People will question Detective Katz and possibly Detective Sullivan if he was present in fact when I took the statement which reduced itself to the Q and A, questions and answers, and through Detective Katz, I will attempt to develop what the defendant said to me." (118).

Moreover, the Miranda warnings given to petitioner prior to the dry run, which was later reduced to the formal Q and A, were the subject of close scrutiny at the Huntley hearing (64-74). On cross-examination ofthe Assistant District Attorney, petitioner's counsel inquired into the rights given, and statements made by petitioner, to the Assistant. Furthermore, the Assistant District Attorney testified at trial that the statements given by petitioner during the dry run and on the formal Q and A were in substance the same (277). Petitioner was given proper notice of the statements to be used against him in compliance with § 813(f) of the former Code of Criminal Procedure.

In addition, petitioner contends that for the first time, at trial the Assistant District Attorney testified that petitioner said, "All right, let's take him." Petitioner claims that he had no notice of this admission in that it was allegedly obtained during the dry run interrogation and was not brought out at the Huntley hearing. Petitioner also contends that the above was the only admission connecting petitioner with the crime. The above contentions are wholly contradicted by the facts. Petitioner not only had knowledge of the "dry run" interrogation but he also had knowledge of the above admission. At the Huntley hearing, the Assistant District Attorney testified that petitioner told him:

> ". . .that during the course of the drive he had a conversation with the other defendant and they said they need money and they were going to take a taxicab driver. . ." (71).

The voluntariness of this statement was subjected to close scrutiny at the Huntley hearing and was ruled admissible.

At trial, the Assistant District Attorney reiterated the testimony given at the Huntley hearing, stating:

> ". . .he maintained that Kenneth Fulmore said to him, 'We're going to take the cab driver', and he said in response thereto, 'All right, he may not have much money but we always need money, let's take him.'".

The testimony at the hearing and trial were in substance the same, that is, petitioner had agreed with his accomplice to take off the cab driver. It would be a distinction in semantics to claim that the statements differed and therefore petitioner did not receive notice of his admission at the hearing.

The credibility of petitioner's claim appears ever more dubious when one considers the fact that at trial absolutely no objection was made to the dry run interrogation or to petitioner's admission, both of which he alleges he had no prior notice of and were so important.

POINT IV

ASSUMING ARGUENDO THAT IT WAS ERROR TO ADMIT IN EVIDENCE PETITIONER'S CONFESSION, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

If any error resulted from the admission of petitioner's second confession at trial, it was indeed harmless error. Even excluding petitioner's confession, the evidence against him was overwhelming. Petitioner's co-participant in the crime testified at trial to the following: petitioner had suggested they "take off the cab" (T. 371) when they entered the cab, petitioner was carrying a silver plated gun (366, 372). Upon demand, the taxicab driver then gave petitioner his money clip (378) and money changer. Petitioner told the driver to lay across the front seat; then, despite the victim's begging (377) petitioner shot him (382). The co-participant further testified that when he asked petitioner why he shot the driver, petitioner replied, "Well, this shows you I can take a life" (386). This testimony was corroborated by items found in petitioner's hotel room at the time of his arrest; namely, the victim's money clip engraved with his and his wife's initials (184),

which the co-participant identified as being the one given to petitioner by the victim (378), a silver plated .38 caliber Smith and Western revolver which the co-participant identified as being the gun petitioner was carrying on the night of the murder (366), and finally a spent shell casing from a .38 caliber Smith and Western bullet. At trial a ballistics expert testified that the spent shell casing which does not eject when fired (299) had been part of a bullet, fired from the gun seized in petitioner's hotel room. This evidence was further corroborated by the autopsy report which revealed that the cab driver had been killed with a .38 caliber Smith and Western bullet which was too deformed to determine whether it had been fired from petitioner's gun.

Based on such overwhelming evidence, it is clear that if there were any error it was harmless beyond a reasonable doubt and the conviction should stand. As the Supreme Court stated in Milton v. Wainwright, 407 U.S. 371, 377-378 (1972), "The writ of habeas corpus has limited scope; the federal courts do not sit to retry cases de novo but rather, to review

for violations of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the State court. . ." Accord, Chapman v. California, 386 U.S. 18, 24 (1967); United States ex rel. Ross v. LaVallee, 448 F. 2d 552 (2d Cir. 1971); Harrington v. California, 395 U.S. 250 (1969. The evidence of petitioner's guilt of this heinous crime was indeed overwhelming.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
April 5, 1976

Respectfully submitted,

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SAMUEL A. HIRSHOWITZ
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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Joan P. Scannell, being duly sworn, deposes and says that ~~he is~~ employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 5 day of April, 1976, ~~he~~ served the annexed upon the following named person :

Ms G Clark Cummings
350 Park Ave
NY NY 10022

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by ~~him~~ for that purpose.

Joan P. Scannell

Sworn to before me this
5 day of April, 1976

Ralph S McMurry

Assistant Attorney General
of the State of New York